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8-17-2009

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Recommended Citation

Steve R. Johnson, *Legislative Rhetoric, or How to Oppose Anything*, 53 *ST. TAX NOTES* 461 (2009),
Available at: <http://ir.law.fsu.edu/articles/315>

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Legislative Rhetoric, or How to Oppose Anything

by Steve R. Johnson



This installment of the column involves a change of focus. Instead of looking at the end of the legislative process — how courts interpret enacted statutes — this installment looks at the phase at which bills are enacted by or defeated in the legislature. However, the two phases have underlying similarities. As we will see, arguments used in

legislative advocacy have counterparts in statutory interpretation advocacy. Our topic is particularly timely. Proposals to revise state and local tax statutes are always with us, of course, but recent budgetary stresses have increased both the number and significance of those proposals.

This journal's sister publication, *Tax Notes*, once reprinted a list of unknown authorship and vintage.¹ A former tax staffer to a member of the Senate Finance Committee found the list, without identifying information, in his old files and made it available for publication. The list sets out some generic objections that can be offered against proposed tax legislation. That sort of catalog is no less useful to state and local tax law practitioners. Many readers of *State Tax Notes* have drafted proposed tax statutes or regulations or have been involved in lobbying efforts for or against them.

The *Tax Notes* list is useful but underinclusive. Today, we greatly expand the catalog. Part I provides a foundation for the topic. Part II enumerates generic or stock objections to tax proposals, sorting them into categories. Part III discusses why knowledge of those pattern arguments is useful to practitioners and advocates.

¹"Generic Arguments Against Tax Provisions," *Tax Notes*, Dec. 10, 2001, p. 1368.

I. Foundation

In this age of spin and sound bites, the label that can be made to stick to an idea or proposal can go a long way toward determining its success or failure.² Thus, legislative advocacy may be viewed with less suspicion if styled as exercising First Amendment rights³ rather than as lobbying. Under whatever rubric, however, that advocacy is an essential operation of democracy.⁴

In the long run, lobbyists are effective if they can provide decision makers with two essential goods: information on which to make decisions and arguments by which to mobilize supporters and respond to critics.⁵ This article is concerned with the second of those, specifically with arguments that can be used to resist tax proposals.

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I have been struck over the years by the frequency with which some stock arguments appear in

²For example, one might vote against a "tax increase" but might vote for the identical measure if packaged as a way to "close loopholes," "balance the budget," "enhance revenue," or "promote fairness." Rhetorically, a major part of the effort in the 1990s and 2000s to repeal or limit the federal estate tax was restyling that levy as the "death tax." See Michael J. Graetz and Ian Shapiro, *Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth*, 74-84, 123-25, 253-55 (2005).

³See, e.g., U.S. Constitution, Amendment I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances").

⁴See generally Donald E. deKieffer, *The Citizens' Guide to Lobbying Congress* 5-6 (rev. ed. 2007).

⁵See, e.g., Robert L. Guyer, *Guide to State Legislative Lobbying*, 134-135 (3d ed. 2007).

discourse about legislative and administrative proposals regarding taxation. Those arguments, with only minor modulations, are advanced against federal, state, and local proposals spanning the policy spectrum. Some arguments are specific to particular proposals, of course, but one cannot follow debates in deliberative forums without a frequent sense of old wine in new bottles or seeing old friends again.

By calling arguments “stock” or “recurring,” I do not intend to demean them. Arguments serve multiple purposes. Sometimes they express genuine concerns; sometimes they are pretextual.⁶ Stock arguments, like specific arguments, may be either genuine or pretextual. “This proposal needs more study,” for example, may in fact be true — it may be a good reason that a given proposal should not be adopted now — or it may be an excuse to delay needed action in the hope that legislation delayed may become legislation denied.

This article catalogs many of the stock arguments used to oppose tax proposals and provides familiar examples of some of them. I hope that identifying and systematizing those arguments will contribute to understanding legislative advocacy and public policy rhetoric.

II. Stock Arguments

This section catalogs over 40 stock arguments that are marshaled, with minor contextual modifications, against many tax proposals. They are arranged by category. There is inevitable overlap among particular items, but that price must be paid to capture nuance.

As will be seen, many of the arguments are opposites of others. One could arrange some of them in the dyadic form famously employed by Prof. Karl N. Llewellyn to undermine canons of statutory interpretation.⁷ Rhetorical flexibility, however, is one of the tools that allows the “sausage factory” of legislation to function.

⁶For discussion of a related concept — the various uses of arguments in judicial opinions — see the special issue of *The University of Chicago Law Review* on “Judicial Opinion Writing,” 62 *U. Chi. L. Rev.* 1363-1520 (1995); see also Robert A. Ferguson, “The Judicial Opinion as Literary Genre,” 2 *Yale J.L. & Human.* 201 (1990); Scott C. Idleman, “A Prudential Theory of Judicial Candor,” 73 *Tex. L. Rev.* 1307 (1995).

⁷Karl N. Llewellyn, “Remarks on the Theory of Appellate Decisions and Rules or Canons About How Statutes Are to Be Construed,” 3 *Vand. L. Rev.* 395 (1950). But see Michael Sinclair, “Only a Sith Thinks Like That: Llewellyn’s Dueling Canons, One to Seven,” 50 *N.Y.L. Sch. L. Rev.* 919 (2005-2006) (sharply criticizing Llewellyn’s treatment). Cf. Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 23 *Yale L.J.* 16, 30 (1913) (arranging rights, privileges, powers, and other concepts in pairs of jural opposites and jural correlatives).

Timing Arguments

- The “too early” argument: “This proposal is premature. Not enough factual development and legal/economic/sociological research has been done. We shouldn’t consider this proposal until more and better research has been done as to the need for this change and its possible effects.”
- The “too late,” “lost opportunity,” or “historical regret” argument: “If this is such a good idea, the time when we really should have done it was [plug in some time when the economy was better so we could have afforded the proposal, the situation was worse so we really needed the change, or some especially egregious example of the problem had recently occurred].”
- “The impetus for this proposal is some recent but isolated and atypical event. We shouldn’t act out of hysteria. Passions need to cool. In the current politically or emotionally supercharged atmosphere, mistakes could be made. Let’s avoid acting in haste, then having to repent at leisure.”
- “Those involved [such as the state or local tax agency after it has messed up badly] have been working hard to improve their performance. We should give their efforts time to come to fruition rather than step in now.”
- “Just a short time ago, we enacted another measure to address this area. We need to give it time to work and we need time to assess its impact before we do anything else.” [For example, “We only recently revised our corporate income tax. Let’s see how well that works before we consider replacing it with a gross receipts tax.”]

Fairness Arguments

- “People have made decisions and taken actions based on the current tax rules. It would be unfair to change the system, harming people’s reliance interests. If any change is made, at the very least the change should be phased in gradually, and some people [that is, I and/or my constituents or clients] should be exempted from it.”
- “The proposed new system contains exceptions. The exceptions arbitrarily treat two or more groups differently. This is unfair, possibly unconstitutional, and might discourage some kinds of activities.”
- “The proposal doesn’t contain express exceptions, but it will affect different groups differently. [For example, the rich could avoid or evade this rule while others couldn’t.] Facial neutrality shouldn’t blind us to unfair differential impact.”
- “The proposal doesn’t contain exceptions, but it should. This ‘one size fits all’ approach does not recognize the realities affecting some groups of taxpayers.”

- "This proposal takes too much from 'the little guy,' so is regressive."
- "This proposal takes too much from the rich, so reflects class envy and class warfare."
- "This proposal takes too much from the middle class, which is the too often neglected social and economic core of the state and the country."
- "This change would hit [fill in the name of the group or class of taxpayers] hardest. But just a little while ago, that group already took a big hit, bearing the brunt of previous tax increases. This is piling on. We can't and shouldn't try to balance the state (or city) budget on the backs of this group."

Economic Arguments

- "Adopting this proposal would drive people/transactions/wealth/intellectual or human capital to those other states or cities that wisely have abstained from adopting similar proposals. In short, the change would hurt this jurisdiction's economic or intellectual competitiveness."
- If the proposal is primarily punitive rather than revenue driven: "It would cause the activity to dry up or to go somewhere else. Don't throw the baby out with the bath water. It's better to have the activity with its small collateral problems than to lose the activity entirely or substantially."
- If the proposal entails procedural changes: "It would cause all manner of secondary effects that would require regulation or cost money to address. When that's taken into account, the proposal would not save time, trouble, and money. Indeed, it might actually increase them."
- "The proposed change would increase transaction costs and decrease the efficiency of the marketplace."
- "The proposal is unnecessarily complex. It may not be administrable. At the least, it would impose excessive burdens of time, money, and inconvenience on the tax agency to regulate and on taxpayers to comply."

Political Arguments

- "This proposal emanated from a very small number of people or stakeholder groups. The broader community needs to be apprised of it, and we need to see whether it has broad support. Therefore, the proposal shouldn't be acted on until there's been full notice and the opportunity for hearings, public comment, or substantial discussion."
- "Whatever the merits of this idea, there would be a strong reaction against it. The benefits would not be worth the amount of political capital that would have to be expended."
- "This change might create a political backlash that could make the whole area worse, not better."

- "The present system is the result of compromise and careful balancing in a landmark act or in a series of acts over a number of years. To change this one part of the whole would be to renege on the compromise and imperil the whole delicate structure."⁸

Priorities and Significance Arguments

- "The benefit of the change would be insignificant." [Compare the benefit of the proposal with the largest plausibly relevant item. For example, "This change would raise at most a few million dollars in additional revenue, which is a drop in the bucket since our budget deficit is in the hundreds of millions or billions of dollars."]
- "This measure would cost too much, imperiling our ability to address more important needs." [Compare the cost of the proposal with the smallest plausibly relevant item. For example, "This tax cut would deplete state (or city) coffers by several million dollars, which is more than we spend every year on [pick some worthy-sounding program that happens to be underfunded]."]
- "Considering and implementing this proposal would divert our energy and attention away from other, more pressing problems."
- "The proposal wouldn't do enough. It's only a cosmetic measure, a mere Band-Aid on a gaping wound."
- "The proposal is not a comprehensive solution. It fails to address important parts of the problem or important related problems." [For example, "I will vote against this proposal because it does nothing to redress the greatest problem we have in our tax system — the gross inequities in how tax burdens are allocated under our antiquated laws."]
- "This proposal addresses only the symptoms, not the root causes of the problem." [For example, "Tax holidays or subsidies do not address the real reasons it's hard to attract and keep companies in this state: our inadequate education (or transportation) infrastructure."]

Institutional Role Arguments

- "This is an area that we have traditionally and properly left in the hands of others to deal with." [For example, "Regulating tax professionals is best done through existing attorney and accountant professional responsibility mechanisms than by creating radical, new tax adviser penalties."]

⁸For the use of the "legislative bargain" approach in statutory interpretation, see Frank H. Easterbrook, "The Court and the Economic System," 98 *Harv. L. Rev.* 4, 15-19 and 51-58 (1984).

- "This body is not expert in this complicated field. We should leave it to the experts." [For example, "Property tax assessments and classifications are better made by tax agencies than the legislature."]
- "The objective of the proposal may be laudatory, but this body lacks the constitutional, statutory, or moral authority to enact this change."

Other Arguments

- "The most powerful law is the law of unintended consequences. This proposal could have adverse unintended consequences." This argument becomes stronger if the proposal is long and complex and the area it affects is arcane or technical, as often is the case in taxation.
- "Other states (or cities) aren't doing what is being proposed. That matters because they have more experience with these issues, or they have a bigger stake in the issue, or [fill in another reason]. We should not be so arrogant that we refuse to consider the wisdom of their experience."
- "Other states (or cities) are doing what is being proposed, but they are different from us. We are a unique place. We should celebrate that uniqueness rather than blindly follow others.⁹ Besides, the proposal didn't work as well there as some would suggest." [Add some snide allusion to a recent or historic failure by that other state or city to insinuate that those folks aren't so smart.¹⁰]
- "People don't engage in [the activity targeted by the proposal] for bad or abusive reasons. They do it in order to [plug in some benign or even noble motivation]." [For example, "Businesses use independent contractors rather than employees for good business reasons, not to reduce employment taxes."]
- "Only a small percentage of [the relevant group] engages in misconduct. Don't hurt the many good ones because of the actions of a few bad apples." [For example, "The overwhelming majority of our not-for-profit corporations do socially important work efficiently. We shouldn't impose excise or penalty taxes or draconian eligibility rules just because a few charities seem to have paid their officials big salaries."]
- "This would be a step in the wrong direction. We need to move in Direction A, but this proposal is an example of Direction B." [For example, "We shouldn't increase taxes to address

this temporary budget shortfall. In the long run, our state's economy and so our budgetary health require that we maintain an attractive business climate."]

- "The objective of the proposal may be laudatory, but there are other means to accomplish this goal, means that may be more effective, less expensive, or less disruptive."
- "The proposal reflects too narrow an analysis." [For example, "To be realistic, our scoring of tax proposals for budgetary purposes must use dynamic, not static, assumptions."]
- "The proposal runs counter to what is best in human character." [For example, "These regressive taxes are mean spirited and would stifle the human need to hope for and aspire to a better future."]
- The ad hominem argument: "This idea is being proposed by [individual or group X]. That's the same individual or group that was pushing [idea Y] only a few months or years ago. [Y] was a terrible idea. We should be wary of another crack-brained idea from the same people."
- The "hallowed memory" argument: "The feature that you're proposing to change was one of the proud achievements of [plug in the name of an esteemed proponent of the current measure]. Discarding his or her contribution is no way to honor this beloved personage." This argument is particularly effective if the personage recently retired, died, or was honored or is about to retire, die, or be honored.

III. Utility

It is useful to be familiar with the stock arguments. That is so whether one finds oneself in the role of an opponent of a particular change or a proponent of it. For opponents, the catalog serves a checklist function. Reviewing the catalog in light of the situation at hand may suggest plausible lines of attack that otherwise might have been neglected.

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For proponents, review of the catalog should be part of the preparation preceding formally proposing a tax measure. That review should help proponents anticipate the types of arguments that will be arrayed against them and thus enable them to develop effective responses to them. Also, seeing which types of arguments opponents deploy gives a sense of the opponents' strategy. For instance, some of the stock arguments are conducive to a strategy of delay. Thus, their use may indicate that the opponents are

⁹In my home state, for example, "Nevada is unique" arguments usually work. I hear that comparable arguments sometimes fall on receptive ears in Texas and other states as well.

¹⁰California and New York are favorite whipping boys for such comparisons.

seeking death by protraction rather than an immediate kill. Some other stock arguments will have greater resonance with some constituencies than with others. Thus, their use may suggest which coalitions opponents are trying to build.

In short, state and local tax policy debates are wonderful vehicles through which to learn about and practice effective legislative advocacy. Awareness of the patterns of arguments can be instructive and fun for those who study the great game of policy advocacy, and the ability to skillfully use or counter those pattern arguments can be a serious enterprise for those who actually play the great game. ☆

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